STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

I/M/O the Ownership of Renewable Energy Certificates ("RECs") Under the Electric Discount and Energy Competition Act, as it Pertains to Non-Utility Generators and the Board's Renewable Energy Portfolio Standards	)	Docket No. EX04080879

COMMENTS OF THE INTEGRATED WASTE SERVICES ASSOCIATION

The Integrated Waste Services Association ("IWSA") is pleased to submit these comments in response to the Board's order of August 27, 2004, which invited comments by interested parties on issues related to the ownership of Renewable Energy Credits (RECs) attributable to energy produced by non-utility generators ("NUGs") at so-called Qualifying Facilities ("QFs").

IWSA was formed in 1991 to promote integrated solutions to municipal solid waste problems, problems that affect New Jersey possibly more than any other state in the nation. IWSA strives to encourage the use of waste-to-energy technology as a key component of community programs. IWSA's membership includes private companies that own and operate waste-to-energy facilities, and also more than fifty organizations and local governmental bodies who support waste-to-energy, including the Port Authority of New York and New Jersey, the Camden County Resource Recovery Facility, and the Camden County Pollution Control Financing Authority.

Among IWSA's activities is the research and publication of an annual directory of waste-to-energy plants. The 2004 directory, available at

http://www.wte.org/2004_Directory/IWSA_2004_Directory02.html (cited hereinafter as "2004 Directory"), reports on 89 waste-to-energy facilities operating in 27 states in the United States generating the equivalent of nearly 2,700 megawatt-hours (MWh) of electricity and disposing of nearly 29 million tons of trash. Five facilities located in New Jersey have a total generating capacity of 168 MW. See 2004 Directory at 24-25. A sixth plant, located in Morrisville, Pennsylvania, with a capacity of 53 MW, also produces electricity that is sold for use in New Jersey. 2004 Directory at 28-29.

In a letter to IWSA last year, the United States Environmental Protection Agency noted last year that these plants provide a "clean, reliable, renewable source of energy" and "with less environmental impact that almost any other source of electricity". A copy of this letter is attached.

Jurisdictional Issues

As the Board is aware, the Federal Energy Regulatory Commission has already ruled that "contracts for the sale of qualifying facility (QF) capacity and energy entered into pursuant to PURPA do not convey renewable energy credits or similar tradeable certificates (RECs) to the purchasing utility (absent express provision in a contract to the contrary)." *American Ref-Fuel Company,* 107 FERC ¶ 61,016 (2004), at par. 1, denying rehearing of 105 FERC ¶ 61,004 (2003), *petition for review pending sub nom. Xcel Energy Services Inc. v. FERC*, Case No. 04-1182 (D.C. Cir. filed June 14, 2004). FERC further stated that "while a State may decide that sale of power at wholesale automatically transfers ownership of the State-created RECs, that requirement must find its authority in State law, not PURPA." Id.

IWSA recognizes that the Board has jurisdiction to interpret its own REC program. However, the Board does not have jurisdiction to create a program that would force QFs to sell

capacity and energy to electric utilities at a price less than the avoided cost established by FERC regulations under PURPA. *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners*, 44 F. 3d 1178, 1191-92 (3d Cir.), *cert. denied*, 516 U.S. 815 (1995) ("*Freehold*"). If the price paid by electric utilities for the clean energy sold by IWSA members were deemed to include the RECs for "free," then the price being paid for the capacity and energy components alone would be less than the avoided cost payable for the same amount of capacity and energy available from another QF that did not produce renewable energy. In other words, a QF producing renewable energy has essentially 3 outputs for sale: capacity, energy, and the REC. Capacity and energy are priced at the utility's avoided cost, which does not change according to the source of the capacity and energy. If a utility were to pay its avoided costs but then in effect receive a rebate in the form of a REC, then it would not be paying the avoided cost for capacity and energy. It would be paying less, which the Board does not have the jurisdiction to require.

In short, whatever jurisdiction the Board has after the FERC ruling is very narrow. The Board does not have the power to force QFs producing clean energy to sell their capacity and energy at less than the prices mandated by the FERC's avoided cost regulations. Once the Board concludes that the EDCs' proposal would lead to precisely this result, the Board will necessarily conclude that it is not free to grant the relief being sought by the EDCs.

Policy Issues

Even if the Board could require clean energy QFs to transfer their RECs to EDCs for free, such a result would be extraordinarily bad policy. As noted above, the environmental benefits of waste-to-energy plants are exceptional. They remove substantial tonnage from our region's landfills, and they produce clean, reliable energy. Allowing the QFs to keep their RECS

and benefit from their sale sets precisely the correct price signals that the Board wishes to foster. Otherwise, if two different technologies are being contemplated for a QF, there will be no incentive to choose the technology that relies on renewable energy, rather than the one that does not, since the price to be charged for the capacity and energy components of the output will be the same regardless of technology.

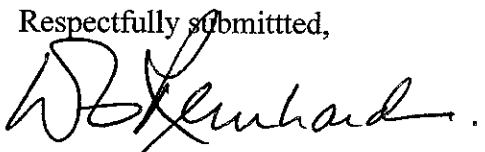
It is true that if suppliers of energy are allowed to satisfy their renewable energy obligations in part with access to "free" RECs, those suppliers' costs of complying with the Board's renewable energy portfolio standards might decrease slightly. But whether those savings will in fact be passed on to consumers, or simply be pocketed by the suppliers, is a matter of speculation. Moreover, to the extent the Board's RPS requirements cause energy costs to be higher than they otherwise would be in the absence of such standards, the Board has already resolved that cost-benefit calculation in adopting the RPS requirements. The Board has properly concluded that there is a social benefit to renewable energy, and that even if in the short run the RPS requirements cause rates to be higher than they otherwise would be, in the long run, the benefits of cleaner air far outweigh the small increase in overall cost.

Accordingly, the EDCs' arguments that they should have access to RECS for free is not only contrary to law but also contrary to good policy. The right incentive – the incentive to produce clean, renewable energy – is set by allowing IWSA members to receive the benefits of the clean energy technology that they deploy, not by siphoning off those benefits as if the renewable aspect of the energy produced by IWSA members is an immaterial byproduct. Especially at this point in time where our nation's dependence on fossil fuel is of such great concern, it would make no sense for the Board to punish one of the most significant sources of renewable energy in New Jersey.

Conclusion

For the foregoing reasons, the Board should, and indeed must, follow the ruling of FERC that agreements for the sale of qualifying facility (QF) capacity and energy entered into pursuant to PURPA do not convey renewable energy credits or similar tradeable certificates (RECs) to the purchasing utility, unless the agreements expressly provide otherwise. Since the agreements at issue do not provide otherwise, there is no legal or policy basis to deprive the QFs of the potential benefit to be realized under the Board's anticipated REC program.

Respectfully submittted,



Walter G. Reinhard
Norris, McLaughlin & Marcus, P.A.
721 Route 202-206
Bridgewater, NJ 08807
(908) 722-0700

September 23, 2004

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 14 2003

Maria Zannes, President
Integrated Waste Services Association
1401 H Street N.W., Suite 220
Washington, DC 20005

Dear Ms. Zannes:

EPA recognizes the vital role of the nation's municipal waste-to-energy industry, and wishes to thank you for your environmental efforts.

Upgrading of the emission control systems of large combustors to exceed the requirements of the Clean Air Act Section 129 standards is an impressive accomplishment. The completion of retrofits of the large combustion units enables us to continue to rely on municipal solid waste as a clean, reliable, renewable source of energy. With the capacity to handle approximately 15 percent of the waste generated in the US, these plants produce 2800 megawatts of electricity with less environmental impact than almost any other source of electricity. With fewer and fewer new landfills being opened, and capacity controls being imposed on many existing landfills, our communities greatly benefit from the dependable, sustainable capacity of municipal waste-to-energy plants.

We applaud the leadership taken by the Integrated Waste Services Association in coordinating research needs to continue to improve the performance of these plants. Your willingness to work with EPA and the State governments on responses to natural or man-made emergencies, including anthrax, is greatly appreciated. Our staff in the Office of Solid Waste and Emergency Response and the Office of Air and Radiation look forward to working with you on defining your research agenda and in addressing our national security concerns.

Sincerely yours,

Marianne Lamont Horinko
Assistant Administrator
Office of Solid Waste and
Emergency Response

Jeffrey R. Holmstead
Assistant Administrator
Office of Air and Radiation